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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and
Cross-Respondent,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,
Respondents and
Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* MICHAEL E. SPIESS, *et al* IN SUPPORT OF LISA M. AVIGLIANO, *et al*

EDWARD JOHN O'NEILL, JR.
Counsel for *Amicus Curiae*
Michael E. Spiess, *et al*

PORTER & CLEMENTS
12th Floor, Lincoln
Liberty Life Building
711 Polk Street
Houston, Texas 77002
(713) 757-7040

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INTEREST OF THE *AMICUS CURIAE*

This Brief is submitted by Michael E. Spiess, Jack K. Hardy, Benjamin F. Rountree and the other members of the multiple nationwide classes certified under FED. R. CIV. P. 23(b)(2) by the district court in *Spiess* v. *C. Itoh & Company (America), Inc.* 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th

Cir. 1981), *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981). Although important differences exist between the *Spiess* case and the case now under consideration by this Court, both cases involve interposition of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (the "Treaty" or the "FCN Treaty") as an alleged bar to claims of national origin discrimination under Title VII of the civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, (1976) ("Title VII"). With respect to the Treaty defense, Spiess et al stand in substantially the same position as Ms. Avigliano and the other Respondents and Cross-Petitioners in the case now before the Court.

Plaintiffs in the *Spiess* case prevailed on the Treaty issue in the district court. The Fifth Circuit reversed the district court in a split decision and ordered plaintiffs' case dismissed. The Fifth Circuit then granted rehearing *en banc*, vacating the prior 2-1 panel opinion against plaintiffs. While the *Spiess* case was awaiting *en banc* rehearing by the Fifth Circuit, this Court granted certiorari in the *Avigliano* case. C. Itoh & Company (America), Inc. ("Itoh-America") then filed a Motion to Stay Further Proceedings before the Fifth Circuit pending a decision by this Court in *Avigliano*. The Motion to Stay was unopposed by plaintiffs. In response to the Motion to Stay, the Fifth Circuit vacated its Order requiring the case to be reheard *en banc* and reinstated the 2-1 panel opinion in favor of Itoh-America. On February 10, 1982, plaintiffs in the *Spiess* case filed a Petition for Certiorari with this Court. The Petition was docketed in this Court as No. 81-1496.

SUMMARY OF THE ARGUMENT

Sumitomo Shoji America, Inc.'s ("Sumitomo") claim that it has an "unqualified right" to discriminate against persons of non-Japanese national origin rests on Articles I(1), VII(1) and

VIII(1) of the FCN Treaty. Article I(1) applies only to persons, not companies, and therefore confers no rights whatever on Sumitomo. Article VII(1) applies to both Sumitomo and its Japanese parent. However, the rights conferred by Article VII(1) are limited by the "national treatment" standard of Article XXII(1). Thus, under Article VII(1), Sumitomo is clearly not entitled to the preferential treatment it seeks. Attention is therefore focused on Article VIII(1), which provides that companies of Japan are entitled to engage, within the territory of the United States, personnel of their choice. As pointed out by Fifth Circuit Judge Reavley in his dissenting opinion in *Spiess* v. *C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), United States incorporated subsidiaries of Japanese companies are companies of the United States rather than companies of Japan under the Treaty. Sumitomo, being a company of the United States, therefore falls outside the scope of whatever rights may be conferred by Article VIII(1). Spiess et al respectfully adopt Circuit Judge Reavley's dissent and urge that it is the most cogent and persuasive analysis yet written concerning the FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

Even assuming, however, that Article VIII(1) applies to Sumitomo, it is clear that the Treaty was not intended to create an island of Japanese immunity within the United States. Bestowing immunity from Title VII on United States incorporated subsidiaries of Japanese corporations is contrary to the initial interpretation of Article VIII(1) by both parties, and is further contrary to the subsequent practice of both parties. In addition, such immunity is contrary to the Charter of the United Nations and to United States policy toward multinational corporations.

ARGUMENT

I. ARTICLE VIII(1) OF THE TREATY, UPON WHICH SUMITOMO'S CLAIM TO IMMUNITY RESTS, DOES NOT APPLY TO UNITED STATES INCORPORATED SUBSIDIARIES OF JAPANESE COMPANIES.

A. Article VIII(1) Is the Cornerstone of Sumitomo's Alleged "Unqualified Right" to Discriminate.

Simply stated, Sumitomo argues that it has the "unqualified right" to discriminate against employees of non-Japanese national origin, derived from the interaction of Articles I(1), VII(1) and VIII(1) of the Treaty. Article I(1) permits entry into the United States of Japanese managerial personnel, referred to as "treaty traders". By permitting entry of such personnel, however, Article I(1) merely effectuates whatever rights are bestowed by Articles VII(1) and VIII(1). It confers no substantive rights *on Sumitomo*. The reason for this is that legal entitles such as Sumitomo are not as such entitled to treaty trader status. Article I(1) of the Treaty speaks of "Nationals" of either party, in contradistinction to "Nationals and companies" as used in Articles VII(1) and VIII(1). Similarly, the Immigration and Nationality Act of 1952 ("I&N Act"), which is also relied upon by Sumitomo and which provides for a specific means of entry of Japanese managerial personnel into the United States, speaks of "nonimmigrants" and "nonimmigrant aliens". 8 U.S.C. §§1201(a)(2) & §§1201(a)(15)(1970). This underlines the uncontested fact that Sumitomo, as such, does not itself have any "unqualified right", or indeed any other right, under Article I(1) of the Treaty. The mere right of an individual to enter the United States in furtherance of international commerce engaged in by his employer does not itself purport to confer on that employer a right to immunity from the application of United States anti-discrimination laws.

Article VII(1) is equally unsupportive of Sumitomo's alleged unqualified right to discriminate. That Article confers rights on

two distinct groups of beneficiaries. However, as will be seen below, Article VII(1) accords neither group of beneficiaries immunity from United States law.

The first group of beneficiaries is described in the first sentence of Article VII(1) as "Nationals and companies of . . . [one] . . . Party . . . engaging in business activities within the territories of the other Party, . . ." Under that sentence, such nationals and companies are entitled to "national treatment". The second group of beneficiaries is described in the third (last) sentence of Article VII(1) to consist of enterprises *controlled by* nationals and companies of the other party. Under the third sentence of Article VII(1), such controlled enterprises are entitled to "treatment no less favorable than that accorded like enterprises controlled by nationals and companies of . . . [the] . . . other Party." Sumitomo Shoji Kabushiki Kaisha (hereinafter referred to as "Sumitomo-Japan"), Sumitomo's Japanese parent, being a company of Japan, is in the first group of beneficiaries. Sumitomo itself, being a company controlled by a company of Japan, is clearly within the second group of beneficiaries.

The "national treatment" standard applicable to the first group of beneficiaries, *i.e.*, to companies of Japan as opposed to companies which they control, is defined by Article XXII(1) as:

> . . . treatment accorded within the territories of a Party under terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . [and] . . . companies . . . of such Party.

This "national treatment" standard as it relates to *companies of Japan* (as opposed to companies which they control) is slightly modified by Article XXII(4), which provides:

> National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States . . ., be the treatment accorded therein to companies created or

> organized in other States, Territories, and possessions of the United States . . . .

Thus, the drafters of the Treaty drew a distinction between companies of Japan on the one hand, and enterprises which they control on the other. While the two categories of benefits conferred by Article VII(1) have "national treatment" as a common denominator, the treatment accorded to "companies of Japan" is subject to more qualifications than that accorded to enterprises controlled by such companies. As is demonstrated below, the right to "national treatment" is no grant of a privilege to disobey valid domestic laws of the host country.

Article VII(1) was construed in *United States v. R. P. Oldham Company*, 152 F.Supp. 818 (N.D. Cal. 1957). As the Court there said:

> Although ... [Article VII of the Treaty] ... equates domestic subsidiaries with their foreign parents, it does so only for purposes of that Article, which has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent is to have the same rights as any domestically owned American corporation. The Article nowhere attempts to give greater rights to such subsidiaries.

152 F.Supp. at 823-24.

This construction of Article VII(1) as it relates to enterprises controlled by companies of Japan is supported by the tabular treaty comparison incorporated into the record of hearings on the FCN Treaty before the Subcommittee of the Committee on Foreign Relations. The following tabulation is part of the tabular comparison just mentioned:

Approved Treaties	Proposed Treaties	
Uruguay	Israel	Japan
Article VI(2): *National treatment* for local companies, controlled by nationals and companies of the other party, engaging in activities listed in Article VI(1).	Article VII(1): Same in substance.	Article VII(1): Same as Israel provision.

"Commercial Treaties", *Hearings before the Subcommittee of the Committee on Foreign Relations, United States Senate*, 83d Cong., 1st Sess., July 13, 1953, at p. 9. (Emphasis added.) Thus, under Article VII(1), Sumitomo, as a "local" company controlled by a company of Japan, is entitled to "national treatment", nothing more, nothing less.

This result would not materially change even if Sumitomo were assumed to be a *company of Japan* for Article VII(1) purposes. The portions of Article VII(1) dealing with the entitlements of companies of Japan operating within the United States are contained in the first two sentences of that section. They read as follows:

> Nationals and companies of either Party shall be accorded *national treatment* with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. *Accordingly*, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies *under the general company laws of such other Party*, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. [(Emphasis added.)]

The standard thus prescribed for companies of Japan is "national treatment", and this standard governs the second sentence as well, which starts with the word, "Accordingly". The specific contents of the benefits listed in sentences 1 and 2 are

thus subject to the "national" legislation of the host country, *i.e.*, the United States.

As stated in the *Oldham* case, "[t]he tenor of the entire Treaty is *equal* treatment to nationals of the other party, not *better* treatment. 152 F.Supp. at 822 & 823. (Emphasis in original.) The portion of the *Oldham* case just quoted is reproduced in the digest of that case in 6 M. WHITEMAN, DIG. OF INT'L L., 148, 149 & 150 (1968), which is the current and most recent official compilation of United States practice in international law.

This interpretation of Article VII(1) is supported by Dr. Herman Walker, who formulated the post World War II form of friendship, commerce and navigation treaty and negotiated many such treaties. As Dr. Walker has written:

> Traditionally, the standard of "national treatment" for the activities of natural persons has been written into United States commercial treaties so that such persons are enabled freely to go about their affairs *without discriminatory burdens or harassments*. A salient characteristic of the treaties of the period since 1946, therefore, has been the explicit extension to company activity of *the same long-established principle*. These treaties (with such exceptions and qualifications as will be mentioned below) thus *assure to companies of either party equality of treatment with companies of the other party*, with respect to engaging in all ordinary business activities, commercial, industrial and financial. This principle applies to both the initial establishment of an enterprise (the entry into the activity) and to the terms and conditions under which the company is entitled subsequently to conduct its enterprise (carry on the activity).

H. WALKER *Companies*, Ch. VII, in R. R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW, 182, 197-98 (1960). (Emphasis added.)

The same view of the matter is held by Professor Dan F. Henderson of the University of Washington, the leading authority on the legal aspects of Japanese-United States trade relations. After setting forth the full text of Article VII, Professor Henderson writes:

> The straightforward provisions established the rights of U.S. citizens to "national treatment" in the establishment and operation of businesses in Japan *and vice versa*, and the apparent purpose is to accord the "foreign enterprise" the *same* rights, *duties*, and privileges, legally, as those enjoyed by domestic business.

D. F. Henderson, *Foreign Enterprise in Japan, Law and Policies* 274 (1973). (Emphasis added.)

This proposition is accepted by Japanese commentators as well. Thus, in discussing the application of certain trade secret disclosure rules of the Japanese Commercial Code to the acquisition of corporate shares through exchanges of property, Professor Fujita has written: "This is a domestic law applicable to the Japanese as well. Therefore, there is no violation of the 'national treatment' clause." Fujita, *Does Japan's Restriction on Foreign Capital Entries Violate Her Treaties?* 3 LAW IN JAPAN 162, 172 note 29 (1969).

Article I(1) applies to individuals, not to companies, and Article VII(1) is limited by the "national treatment" standards of Article XXII. Thus, neither Article I(1) nor article VII(1) supplies Sumitomo with the preferential treatment it seeks. Attention is thus focused on Article VIII(1).

B. Sumitomo Is a Company of the United States for Purposes of Article VIII(1) of the Treaty and Is Thus Entitled to No Greater Rights Than Any Other United States Company.

That portion of Article VIII(1) upon which Sumitomo's claim to immunity rests provides that *"Nationals and companies of either Party* shall be permitted to engage, *within the territories of the other Party* . . . . executive personnel and other specialists

of their choice." (Emphasis added.) Stated otherwise, in terms applicable to Sumitomo's claim to immunity, a *company of Japan* is entitled to engage within the territory of the United States, personnel of its choice. The pivotal inquiry thus becomes the nationality of Sumitomo, since if Sumitomo is a company of the United States rather than of Japan, it falls outside the scope of Article VIII(1) for purposes of this case.

In *Spiess* v. *C. Itoh & Company (America), Inc.*, 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd* 643 F.2d 353, (5th Cir. 1981), *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981), Spiess et al briefed at considerable length the question whether Itoh-America is a company of the United States or a company of Japan for Article VIII(1) purposes. The dissenting opinion of Fifth Circuit Judge Reavley (643 F.2d at 363) held that Itoh-America is a company of the United States rather than a company of Japan, and therefore falls outside the scope of Article VIII(1). Sumitomo, like Itoh-America, is a United States corporation wholly owned by a company of Japan. Judge Reavley's analysis is therefore equally applicable to Sumitomo, and Spiess et al adopt it and respectively direct this Court's attention to it as the most cogent and scholarly analysis yet written concerning the Article VIII(1) FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

C. The Administrative Determination of Corporate Nationality for "Treaty Trader" Purposes Does Not Alter the Conclusion That Sumitomo Is A Company of the United States and Is Thus Entitled to No Direct Benefits Under Article VIII(1) of the Treaty.

Article I(1) of the Treaty, which allows Japanese nationals to enter the United States for the purpose of carrying on trade, is statutorily implemented by 8 U.S.C. §1201(a)(2)(1970), which provides that under the conditions of the I&N Act or "regulations issued thereunder", United States consular officers may

issue visas to nonimmigrants as defined in 8 U.S.C. § 1101(a)(15) (1970). Subsection (E)(i) of this latter provision defines nonimmigrant aliens to include aliens entitled to enter the United States under a treaty of commerce and navigation for the purpose of carrying on substantial trade between the United States and the foreign state of which the alien is a national.

These "treaty trader" and "treaty investor" provisions are implemented by State Department Regulations codified in 22 C.F.R. 41.40 and 41.41 (1979), respectively. 22 C.F.R. 41.40 provides, in part, that an alien is classifiable as a treaty trader if he will be employed in the United States by an organization which is principally owned by a person or persons having the nationality of the treaty country. However, this administrative determination of corporate "nationality" is strictly limited in purpose to a specific requirement for the issuing of treaty trader visas pursuant to United States immigration legislation and regulations adopted in connection therewith. *Matter of N.....S.....*, I. & N. 426 (1957). It is connected to the Treaty only through the statutory requirement that the applicant be a national of a country with which the United States has a treaty of commerce and navigation.

The limited scope of the administrative determination of corporate nationality *for treaty trader purposes* is further demonstrated by the July 23, 1952 cable from Secretary of State Dean Acheson to the United States Embassy in Tokyo, which is reproduced in Appendix 1 to this Brief. The cable states that Article XXII(3) of the Treaty:

> ... establishes that whether or not a juridical entity is a "company" of either Party, for *treaty* purposes, *is determined solely by the place of incorporation.* Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. [(Emphasis added.)]

It is apparent from the date and contents of the cable that it was intended to be communicated to the Japanese negotiators of the Treaty, which was eventually signed on April 2, 1953.

The same position was taken by the State Department in the telegrams which are reproduced in Appendices 2 and 3 of this Brief. As shown in Appendix 2, the Embassy originally informed the Japanese Ministry of Foreign Affairs "as to view of U.S. that nationality of a majority of the stockholders constitutes the nationality of the company". However, the incorrectness of that position was expressly noted in a State Department response to the Tokyo Embassy dated January 9, 1976, signed by Secretary of State Henry Kissinger. (Appendix 3). Thus, it is the official United States position, expressed by Secretary of State Acheson in 1951 and reiterated by Secretary of State Kissinger in 1976, that under the Treaty, a company has the nationality of the place where it is established, irrespective of the nationality of the majority of its shareholders. Sumitomo is therefore a company of the United States rather than a company of Japan, and falls outside the scope of whatever rights are conferred by Article VIII(1).

II. EVEN IF SUMITOMO IS SOMEHOW COVERED BY ARTICLE VIII(1) OF THE TREATY, IT DOES NOT HAVE THE "UNQUALIFIED RIGHT" TO HIRE AND COMPENSATE PERSONS OF JAPANESE NATIONAL ORIGIN IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF AMERICAN LAW PROSCRIBING DISCRIMINATION IN EMPLOYMENT.

A. The Initial Interpretation Of Article VIII(1) Indicates That It Was Intended To Prohibit Racial Discrimination, Not To Shield It.

In the article by Dr. Herman Walker entitled *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956), there is almost contemporaneous authority on the intent of the parties with respect to Article VIII(1) of the

Treaty. Dr. Walker wrote that Article VIII was a provision designed "*to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.*" 50 AM. J. INT'L L. at 386. (Emphasis added.)

It is unlikely that a provision designed to *prevent* imposition of "ultra-nationalistic policies with respect to essential executive and technical personnel" was intended by the parties as conferring upon each other's nationals and companies the "unqualified right" to engage in this same conduct in the face of fair employment legislation. The existence of such legislation could not have been unknown to the contracting parties during the time the Treaty was being negotiated, for in 1951, the State of New York had enacted its Human Rights Law, which expressly declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York Executive Law, § 296(a) (first enacted by N.Y. Laws 1951, ch. 800).

Moreover, during the time the Treaty was being negotiated, and prior to the effective date of the Treaty in both countries, the parties clearly contemplated additional legislation of this general type, as is apparent from the second paragraph of the preamble of the Treaty of Peace with Japan of September 8, 1951, 3 U.S.T. 3171, which recites that:

> Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and

> already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to intentionally accepted fair practices.

This clause was drafted by the United States, and accepted by Japan without objection. 1951 IV *U.S. For. Rel.* 1024, 1025 & 1171. In Articles 55 and 56 of the Charter of the United Nations, 59 Stat. 1037, 1045-46, the members of that Organization pledge themselves to "take joint and separate action" for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Civil rights legislation relating to employment is one of the prototypes of action for the achievement of that goal. It follows that the parties knew, or were highly likely to be aware of, civil rights legislation then actually in effect and proscribing the type of conduct here involved; that they condemned such conduct as a matter of policy; and that Japan undertook to proscribe it by legislation while at the same time being aware of the Treaty commitment of the United States to do likewise. Thus, the most reasonable interpretation of Article VIII(1) as originally conceived is that it was intended to prevent "ultra-nationalistic" employment practices based on criteria such as race, not to create a shield against civil rights legislation proscribing such employment practices altogether.

B. The Subsequent Practice of the United States and Japan Demonstrates That the Application of Title VII to Sumitomo Does Not Violate the Treaty.

Subsequent agreements of the parties, as well as their subsequent practice, are to be taken into account in the interpretation of treaties. *Vienna Convention of the Law of Treaties*, 1969, article 31(3)(a) & (b), 63 AM. J. INT'L L. 875, 885 (1969). Although this convention is not yet in effect, its provisions are accepted as accurate statements of present-day international law. *See generally*, KEARNEY & DALTON, *The Law of Treaties*,

64 AM. J. INTL'L L. 495 (1969), and *e.g.*, the *Fisheries Jurisdiction* Cases, 1973 I.C.J. Rep. 3, 18-19 (U.K. v. Iceland); *Id.* 49, 59 (West Germany v. Iceland).

In this connection, both Japan and the United States are members of the Organization for Economic Cooperation and Development ("OECD"), established by treaty on December 14, 1960, 12 U.S.T. 1729. On June 21, 1976, the OECD Council adopted a Declaration on International Investment and Multinational Enterprises, with an Annex of Guidelines for Multinational Enterprises. (*See* 1976 *Digest of United States Practice in International Law* 518-19.) In the Declaration, the OECD members "jointly recommend to multinational enterprises operating in their territories the observance of the guidelines as set forth in the annex" thereto. *Id.* 520-24. As regards "Employment and Industrial Relations," the Guidelines provide that enterprises should "within the framework of law, . . . in each of the countries in which they operate:"

> (4) observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country;
>
> (5) in their operations, to the greatest extent practicable, utilize, train and prepare for upgrading members of the local labor force in cooperation with representatives of their employees and, where appropriate, the relevant governmental authorities;
>
> . . . .
>
> (7) implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity; . . . .

Id. at 524. (Emphasis added.)

While the Guidelines are not legally enforceable as such, they clearly embody the policy of the member states of the OECD. They constitute, as their inclusion in the State Department's official *State Practice* volume for 1976 indicates, the "state practice" of the participating states as that term is understood in international law.

It follows that since these Guidelines constitute state practice of Japan and the United States, and since, moreover, they embody an agreement between these two countries (among others) as to policy with respect to multinational corporations, they serve as aids in the interpretation of Article VIII(1) of the Treaty. This leads to the further conclusion that the application of Title VII to the components of Japanese multinational enterprises operating in the United States does not, in the view of these countries, violate agreements existing between them. Quite the contrary, Title VII is manifestly an "established governmental polic[y] which specifically promote[s] greater equality of employment opportunity; . . . ." and as such, is fully endorsed by both the United States and Japan in a statement specifically dealing with multinational enterprises.

C. Title VII Is the Type of Legislation Contemplated and Encouraged by the Charter of the United Nations, Which Prevails Over the FCN Treaty to the Extent of Any Conflict Between the Two.

In the preamble of the Peace Treaty with Japan quoted above, Japan declared its intention to seek membership in the United Nations. On December 12, 1956, by General Assembly Resolution 1113(XI), Japan was admitted to the United Nations. Japanese Association of International Law, *Japan and the United Nations* 226, note 12. (*See* U.N. Charter, Articles 2 & 4.) It follows that the Charter of the United Nations is, so far as Japan and the United States are concerned, a treaty concluded subsequent to the coming into force of the Treaty here in issue.

The application of successive treaties relating to the same subject matter is regulated by Article 30 of the Vienna Convention of the Law of Treaties. 63 AM. J. INT'L L. at 884-85. As there stated, where (as here) all the parties to an earlier treaty are parties to a later treaty but the earlier treaty is not expressly terminated or suspended by the later one, "the earlier treaty applies only to the extent that its provisions are compatible with the later one, ..." *Id.* at Article 30(3). Moreover, Article 103 of the United Nations Charter provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under *any other international agreement*, their obligations under the present charter shall prevail.

59 Stat. at 1053.

Thus, the Charter of the United Nations prevails over the FCN Treaty both as *lex posterior* and as *lex superior*. The United Nations Charter, as the later, and in any event, the higher law prevailing in case of a conflict between it and the FCN Treaty, provides that one of the four stated "Purposes of the United Nations" is:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Chapter I(3), 59 Stat. at 1037.

The subject of human rights and fundamental freedoms is further dealt with in Chapter IX of the Charter, entitled "International Economic and Social Cooperation." 59 Stat. at 1045-46. Article 55, which is the initial provision of Chapter IX, provides that the United Nations shall promote universal respect for, and observance of, human rights without distinction as to race. Article 56 provides:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

59 Stat. 1045-46.

There has been much dispute as to the legal significance of these provisions of the Charter. *See* SCHLUTER, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110 (1973). Debate focuses primarily on the question whether Articles 55 and 56 of the Charter are "self-executing", *i.e.*, whether they are effective domestic law of the United States by virtue of the Supremacy Clause (U.S. Const., art. VI(2)), or in need of implementing legislation. The leading authority for the proposition that these provisions are not self-executing is *Sei Fujii* v. *State*, 38 Cal.2d 718, 242 P.2d 617 (1952). After observing that the Preamble of the Charter imposed no legal obligations upon member nations and created no rights in private persons, the California Court went on to state, in a much-quoted passage:

> *Although the member nations have obligated themselves* to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that *future legislative action by the several nations would be required to accomplish the declared objectives*, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

242 P.2d at 621 (Emphasis added.)

Surely, Title VII is an instance of "future legislative action by the several nations" required for transforming the obligations of the member states into binding rules of domestic law. This is demonstrated not only by the contents of Title VII itself, but also by the practice of the United States after passage of Title VII. Information describing the substance of Title VII was officially made available by the United States to the United

Nations for inclusion in the United Nations' *Yearbook on Human Rights for 1964*, see *Id.* 283 note 1, and characterized therein as "Landmark Legislation, *Id.* 283-84.

Moreover, a specific reference to Articles 55 and 56 of the Charter of the United Nations, together with an undertaking by Japan to seek to create within Japan the conditions contemplated by these provisions, was incorporated into the 1951 Peace Treaty with Japan, 3 U.S.T. 3171, at the instance of the United States. This demonstrates that the human rights clauses of Chapter IX of the Charter were deemed to be of particular significance between Japan and the United States. As the Charter of the United Nations is both the "higher law" by virtue of Article 103 thereof and, in any event, the later law in relation to the FCN Treaty, it follows that any conflict between the Treaty and Title VII must be resolved in favor of Title VII.

D. United States Policy Toward Multinational Corporations Supports the Conclusion That United States Incorporated Subsidiaries of Foreign Companies Are Subject To Title VII.

The 1976 *Digest of United States Practice In International Law*, at 505 & 506, contains two pertinent statements on multinational corporations. First, Deputy Secretary of State Robert S. Ingersoll, on March 5, 1976, stated:

> In international discussions of enterprise behavior, the United States has supported two basic principles:
>
> — First, *all sovereign states have the right to regulate the activity of foreign investors in their territory*, consistent with the minimum standards of justice called for by international law; and
>
> — Second, *investors must respect the laws of the nations in which they operate and conduct themselves as good corporate citizens of these nations*, refraining from improper interference in their internal affairs. [(Emphasis added.)]

The second pertinent statement was made by Secretary of State Kissinger at the June 21, 1976 OECD Council meeting:

> We are able to announce today the acceptance by OECD member governments of a declaration on investment. This declaration extends the cooperation which has characterized our trade and monetary relations into the area of investment. It includes:
>
> — Recommended guidelines for the activities of multinational corporations;
>
> *The United States strongly endorses this declaration and urges its widest possible adoption and observance.*

75 Dep't State Bull. 73, 76 (1976) (Emphasis added.)

As pointed out at page 15, *supra*, the Guidelines for the Activities of Multinational Enterprises, which received the strong endorsement of the United States, include several statements prescribing non-discriminatory employment policies to be followed by multinational enterprises. To the extent that the "international foreign policy of the United States" is relevant to the present context, therefore, both the principles governing that policy and the consequences deriving therefrom with respect to the employment and promotion of management-level personnel have been spelled out by officially reported high level policy statements. These statements squarely support the application of Title VII to United States-incorporated subsidiaries of Japanese companies such as Sumitomo.

Finally, Congress has recently dealt with the subject of employment discrimination by multinational corporations in the Foreign Boycotts legislation of June 22, 1977, 91 Stat. 244 and 50 U.S.C. app. §2403a (1981). Pursuant to §2403-1a, (a) (1) thereof, the President is directed to:

> ... issue rules and regulations prohibiting any United States person from complying with, furthering, or supporting any foreign boycott directed against a third country friendly to the United States through, among other things, (b) Refusing, or requiring any other person to refuse, to

> employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

The term "United States person", as used in this context, is defined to include:

> ...any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), *any domestic concern (including any permanent domestic establishment of any foreign concern)* and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

50 U.S.C. app. §2410(2) (1981). (Emphasis added.)

Sumitomo is thus a "United States person" for purposes of the Foreign Boycotts legislation. The conduct complained of in the case now before the Court would constitute a violation of that statute but for the lack of intent to act in furtherance of a foreign boycott. The lack of such intent does not mean, however, that discriminatory employment practices as described by 50 U.S.C. app. §2403-1a, (a)(1)(B) (1981) is immunized from other federal legislation in point. Clause (4) of this subsection expressly provides:

> Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or *civil rights laws* of the United States [(Emphasis added.)]

The Boycott Prohibition legislation demonstrates, once more, the extreme gravity of Congressional disapproval of employment discrimination.

E. Article VIII(1) Was Not Intended to Create an Island of Japanese Immunity from United States Civil Rights Laws.

In the final analysis, Sumitomo's claim to preferential treatment is based on the words "of their choice" in Article VIII(1). As appears below, the purpose of including these words in the Treaty was to avoid "percentile" legislation which remained in effect in many states following World War II. "Percentile" legislation refers to laws imposed by many states which required a foreign employer to maintain a certain proportion of Americans in his workforce. The Foreign Service Despatch from the High Commissioner for Germany to the Department of State, No. 2529, March 18, 1954 (Appendix 4), makes clear the intent of the words "of their choice" as used in Article VIII(1). There, commenting on Article VIII(1) of the proposed German Treaty, which was identical for present purposes to Article VIII(1) of the Treaty here in issue, Carl H. Boehringer, United States Commercial Attache to Germany, stated that the major "special purpose of Article VIII(1) was to preclude the imposition of "percentile" legislation.

Sumitomo's contention that the words "of their choice" operate in addition to avoid subsequently enacted fair employment laws is simply incorrect. The critical distinction between the percentile laws in effect at the time of the Treaty's passage and the subsequently enacted fair employment laws which Sumitomo seeks to avoid is that exempting companies of Japan from percentile laws placed them on an equal footing with United States companies, whereas exempting companies of Japan from Title VII would place them in a preferred position to United States companies. This was not the intent of the Treaty's drafters.

The significance of the distinction discussed above has been explained by Dr. Herman Walker, whose writings elsewhere are heavily relied upon by Sumitomo. In 1958, Dr. Walker wrote:

> The specific content of the treatment, [provided by a treaty], at any given point of time and in connection with any given subject, is determinable *not from a reading of the treaty itself, but by reference to an [existing] exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958). (Emphasis added.)

Dr. Walker's statement makes it clear that Article VIII(1) is best understood against the background of providing *national treatment* in order to ensure *equality of competitive opportunity*. With respect to employment in particular, the clear purpose of the Treaty was to insure that Japanese companies would not be discriminated against. It was not to put such companies in a preferred position vis-a-vis their United States counterparts.

In line with Dr. Walker's statement that the treatment afforded by a treaty, at any given point in time and in connection with any given subject, is to be determined by reference to then existing law rather than from a reading of a treaty itself, it must be remembered, as pointed out above, that in 1951, prior to the effective date of the Treaty, the State of New York (in which Sumitomo was incorporated) (App. 34a) enacted its Human Rights Law, which declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, *race*, creed, *color, national origin* or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual *or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*

New York Executive Law, §296(a) (first enacted by N.Y. Laws 1951, ch. 800.) (Emphasis added.)

Sumitomo, at page 20 of its Brief, cites Dr. Walker for the proposition that the Treaty accords it the right to employ executive personnel of its choice on a " 'non-contingent' or unconditional basis." Attribution of such a conclusion to Dr. Walker, without further explanation, can be misleading. According to Dr. Walker, post-war treaties of friendship, commerce and navigation are organized along three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. National and most-favored-nation treatment are so-called "contingent standards". H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958). Absolute rules, on the other hand, are often referred to as "non-contingent" standards or terms. *Id.* at 811. According to Sumitomo, the fact that the language of Article VIII(1) is couched in terms of an absolute ("non-contingent") rule rather than a contingent standard (national treatment) shows that Article VIII(1) goes beyond national treatment and provides a non-contingent rule of preferential treatment.

Appellees respectfully submit that this conclusion is incorrect. As stated by Dr. Walker with regard to absolute rules:

> An attempt to construct a treaty primarily in non-contingent terms [absolute rules] can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the two-fold reason that prudent governments will wish escapes for future contingencies *and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 812 (1958). (Emphasis added.) The Treaty was simply never intended to confer privileged status upon companies such as Sumitomo.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

EDWARD JOHN O'NEILL, JR.
Counsel for *Amicus Curiae*
Michael E. Spiess, *et al*
PORTER & CLEMENTS
12th Floor, Lincoln Liberty
Life Building
711 Polk Street
Houston, Texas 77002
(713) 757-7040

CERTIFICATE OF SERVICE

I, EDWARD JOHN O'NEILL, JR., attorney for *amicus curiae* Michael E. Spiess, et al, do hereby certify that contemporaneous with depositing the foregoing Brief in the United States mail, addressed to the Clerk of the United States Supreme Court, that three copies of the Brief were mailed to the following counsel for Petitioner and Cross-Respondent, Sumitomo Shoji America, Inc.:

J. Portis Hicks
Wender, Murase & White
400 Park Avenue
New York, New York 10022.

EDWARD JOHN O'NEILL, JR.